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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 176.

MORRIS LELAND,

Appellant,

vs.

THE STATE OF OREGON

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

REPLY BRIEF OF APPELLANT

THOMAS H. RYAN,
ANTHONY PELAY, JR.,
JOHN D. RYAN and
HAROLD L. DAVIDSON,
Counsel for Appellant.

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Reply to Appellee's Answer to Appellant's Assignment of Error No. One

"ASSIGNMENT OF ERROR NO. ONE

The courts below erred in upholding the validity of Oregon's statutes regarding the proof of insanity despite defendant's contention that said statutes, 26-929 and 23-122, OCLA, deprived defendant of his life and liberty without due process of law as guaranteed under the 14th Amendment to the United States Constitution; in that defendant was required to prove he was insane

> beyond a reasonable doubt and was not permitted by statute to establish the mental disease from which he was suffering as a defense to a crime."

Appellant in urging this assignment of error does not question the right of the state to determine the form of process. What is questioned is whether the process afforded is due process; or, in the case of the particular type of insanity from which the appellant is suffering, any process. If due process was not afforded, then the laws of the State of Oregon violate the 14th Amendment to the Constitution of the United States. The citation of cases by appellee regarding this case does not require an answer. We must, however, point out that our agreement with the rule does not imply that the rule is pertinent to the facts here put in issue. Rather, we would say that the process supplied in Oregon, in the language of Mr. Justice Frankfurter in *Adamson* v. *California*, 332 U. S. 46, 67 S. Ct. 1672, would . . .

> "offend those canons of decency and fairness which express the notions of English speaking peoples even towards those charged with the most heinous offense."

The state would have this Court believe that there is little difference between the rule in Oregon and the rule in those states which would require the defendant to prove his insanity by a preponderance of the evidence. To state such a proposition is to answer it. We will not again call the attention of this Court to the extremely difficult proposition to be proven and the great variance in the opinions to be elicited as to a particular person's condition. Proof beyond a reasonable doubt of insanity is in fact an impossibility. It would make no difference whether this proof were to a jury, a Court, or a panel of experts. The same impossibility would attend the burden placed upon the defendant by the State of Oregon. It would in effect deny due process.

With reference to 23-122, our so-called "morbid propensity" statute, our attack on the same does not require us to assume the so-called irresistible impulse rule. Rather, we are attacking the requirement that insanity is a purely intellectual condition and limited to the *knowledge* of right and wrong. In this case the defendant has a defect of volitional power and he, because of said defect, is unable to appreciate the reality of right and wrong. If this is a morbid propensity to commit a crime, this propensity in itself is a disease; and to punish a man for a disease offends our ideas of justice and indeed is a wrongful act by the sovereign. It certainly violates the 14th Amendment of the Constitution of the United States.

Our argument criticizing the refusal of the State of Oregon to keep abreast of scientific reality has not been answered. If our Constitution permits a state to ignore scientific reality and medical fact, then the process applied can only operate in a field of legal fiction. That process is far from being due process, and if it were not for the terrible consequences of such stubbornness to the party suffering therefrom, would make the state and its process a fit subject of ridicule.

Again we repeat that the State has no right to punish unless there is fault. The effect of 23-122 OCLA is to permit such punishment. We do not urge the irresistible impulse rule nor do we say the state would have to abandon the right and wrong rule. We only say that when the state accords process, it must be a real process and must appreciate the realities of scientific fact and medical progress.

Appellant contends quite strongly that, over and above the problem of the defense of insanity, the effect of the presumption of insanity being on the defendant, particularly in a case of first degree murder, shifts the burden of

proof from the state to the defendant. How can we expect a jury to make a fine distinction between the willfulness required to convict a man of deliberate and premeditated murder and the lack of ability to will from which he suffers in this particular type of insanity? First degree murder requires premeditation and willfulness, both of which are essential and long recognized elements of that crime. The effect of the rule requiring the defendant to prove his insanity even by preponderance of the evidence confuses the issue and does shift the real burden of proof. Under the Oregon rule, the confusion is even greater as that is the same burden of proof by which the state has to prove the crime.

Assume that the affirmative defense of self-defense were required to be proven by a preponderance of the evidence, or, as in Oregon, by beyond a reasonable doubt. Would this Court then say that the burden of proof had not shifted and that the presumption of innocence was destroyed?

The State contends that there is no legal support to the fact that the burden shifted to the defendant. On the contrary the majority of the States so hold. Typical of the rule of those cases is the holding in the Federal rule in the case of *Davis* v. *United States*, 160 U. S. 469, 40 L. Ed. 499.

> "Upon whom, then, must rest the burden of proving that the accused, whose life it is sought to take under the forms of law, belongs to a class capable of committing crime? On principle, it must rest upon those who affirm that he has committed the crime for which he is indicted. That burden is not fully discharged, nor is there any legal right to take the life of the accused, until guilt is made to appear from all the evidence in the case. The plea of not guilty is unlike a special plea in a civil action, which, admitting the case averred, seeks to establish substantive grounds of defense by a preponderance of evidence. It is not in confession and

avoidance, for *it is a plea that controverts the existence of every fact essential to constitute the crime charged.* Upon that plea the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty; and his guilt cannot in the very nature of things be regarded as proved, if the jury entertain a reasonable doubt from all the evidence whether he was legally capable of committing crime.

* * * * *

" . . . But to hold that such presumption (of sanity) must absolutely control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt or to the reasonable satisfaction of the jury, *is in effect to require him to establish his innocence, by proving that he is not guilty of the crime charged.*

* * * * *

"Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict is whether, upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt. *If the whole evidence, including that supplied by the presumption of sanity, does not include beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged.* His guilt cannot be said to have been proved beyond a reasonable doubt—*his will and his acts cannot be held to have joined in perpetrating the murder charged—if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable*

of committing crime, or (which is the same thing) whether he wilfully, deliberately, unlawfully, and of malice aforethought took the life of the deceased. As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of guilty as charged is that the jury believed from all the evidence beyond a reasonable doubt that the accused was guilty, and was therefore responsible, criminally, for his acts. How, then, upon principle or consistently with humanity can a verdict of guilty be properly returned if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime?'' (Emphasis added).

See also People v. Garbutt, 17 Mich. 9, in opinion by Mr. Justice Cooley in which is stated as follows:

"It is not to be denied that the law applicable to cases of homicide where insanity is set up as a defense, is left in a great deal of confusion upon the authorities; but this, we conceive, springs mainly from the fact that courts have sometimes treated the defense of insanity as if it were in the nature of a special plea, by which the defendant confessed the act charged, and undertook to avoid the consequences by showing a substantive defense, which he was bound to make out by clear proof. The burden of proof is held by such authorities to shift from the prosecution to the defendant when the alleged insanity comes in question; and while the defendant is to be acquitted unless the act of killing is established beyond a reasonable doubt, yet when that fact is once made out, he is to be found guilty of the criminal intent, unless by his evidence he establishes with the like clearness, or at least by a preponderance of testimony, that he was incapable of criminal intent at the time the act was done . . . *These cases overlook or disregard an important and necessary ingredient in the crime of murder; and they strip the defendant of that presump-*

tion of innocence which the humanity of law casts over him, and which attends him from the initiation of the proceedings until the verdict is rendered . . ." (Italics added)

See also the case of Hopps v. People, 31 Ill. 385.

". . . In every criminal proceeding before a jury, without any exception, if a reasonable doubt is entertained of the guilt of the accused, the jury are bound to acquit, Now, what is essential to the commission of a crime? Our statute declares, to constitute crime, there shall be a union or joint operation of act and intention, or criminal negligence. The overt act is one ingredient, the intention another, and their union is indispensable to constitute guilt. Intention is proved by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused. The killing alone, under the most aggravated circumstances, will not suffice, if sound mind and discretion be wanting. Sound mind is presumed, if the accused is neither an idiot, lunatic, 'nor affected with insanity.' If he be affected with insanity, then sound mind is wanting, and crime is not established. *Sound mind, or sanity, then, is an ingredient in crime, quite as essential as the overt act.* Who will deny, if there be a reasonable doubt as to the overt act, that the jury are bound to acquit? Equally imperative must be the rule, if a reasonable doubt be entertained as to the sanity of the prisoner. *Sanity is guilt, insanity is innocence; therefore, a reasonable doubt of the sanity of the accused, on the long and well-recognized principles of the common law, must acquit.* Suppose the question was one of identity, would not a reasonable, well-founded doubt on the point, acquit the prisoner? Suppose an alibi was sought to be proved, and proof sufficient was offered, to create a reasonable doubt whether the accused was at the place, and at the time, when and where the offense was alleged to have been committed, is not the prisoner entitled to the benefit of the doubt? So,

if the defense be that a homicide was justifiable or excusable, is not the principle well settled, a reasonable doubt will acquit? The rule is founded in human nature, as well as in the demands of justice and public policy. *Innocence is the presumption; guilt being alleged, the State making the charge is bound to prove it;* the State is bound to produce evidence sufficient to convince the mind of the guilt of the party. If a reasonable doubt is raised, then the mind is not convinced, and being in that unsettled state, whatever the probabilities may be, a jury cannot convict. It is entirely impossible for them to say the accused is guilty, when they entertain a reasonable doubt of his guilt.

"It is urged by the prosecution, that the burden of proof is on the accused, to make out his defense. That sanity being the normal condition, insanity must be established by preponderating evidence.

"*We do not understand the burden of proof is shifted on the defendant.* Every man charged with crime, is entitled to claim the benefit of all the provisions of the law. In every case of murder the first inquiry is, has the homicide been committed—did the prisoner do the deed—did he intend to do it—was he of sound mind and not affected with insanity when the act was done, and was the act done with malice aforethought, express or implied? These are, all of them, affirmative facts and must be proved by the prosecution. The State avers their existence—they are all essential to constitute the crime, and the State must prove them—the burden of proof is on the State. But it is said, the State is relieved of the burden by proving the prisoner did the act, the law implying that he intended to do it, and that the presumption is, every man is of sound mind. *These are but presumptions, and when they are rebutted by proof of absence of criminal intention, by reason of unsoundness of mind or a reasonable doubt is raised on the point, that doubt must avail the prisoner. Can it be properly said, in criminal cases the burden of proof ever shifts, so long as the defendant bases his defense on the denial of any essential allegation in the indict-*

ment? We think not. The prosecution is bound, on every principle of correct pleading, and of justice, to maintain their allegations; and it is not in their power to shift the burden on to the defendant. Commonwealth v. McKie, 1 Gray (Mass.) 61. *The presumption of innocence is as strong as the presumption of sanity. The burden of proof must, therefore, always remain with the prosecution to prove guilt beyond a reasonable doubt*—a serious and substantial doubt, not the mere possibility of a doubt.

"The rule here announced, differs from that laid down in Fisher's case, 23 Ill. 293. In that case we said, sanity being the normal condition, it must be shown by sufficient proof, that from some cause, it has ceased to be the condition of the accused. The opinion in that case, was prepared under peculiar circumstances not admitting of much deliberation, and this point was not pressed upon the attention of the court, or argued at length. Further reflection has satisfied us, it was too broadly laid down, and that justice and humanity demand, the jury should be satisfied, beyond a reasonable, well-founded doubt, of the sanity of the accused. The human mind revolts at the idea of executing a person whose guilt is not proved, a well-founded doubt of his sanity being entertained by the jury."

There are many other cases that could be cited, but suffice it to say, that the majority rule in the country and the rule of good sense is that the burden proving sanity is so entwined with the question of willfulness and premeditation that the Oregon rule is shifting the full burden to the defendant and deprives the defendant of his presumption of innocence. This court has held that the presumption of innocence is an integral part of due process. See *Tot* v. *United States*, 319 U. S. 463, 63 S. Ct. 1241.

To treat insanity as it is treated in Oregon is much more violative of the principle for which these cited cases stand then the treatment by those states which merely require

the proof of insanity by the preponderance of the evidence. Yet counsel feels that even in those states the burden is shifted to the defendant, and his presumption of innocence is destroyed. In the question of a crime in which the willfulness and specific intent are essential elements, this presumption of innocence becomes a mockery as the state is in reality relieved of this burden by the Oregon rule and even by the less stringent rules of the minority states. This fact is well recognized in many cases including those above cited.

To sum up the Oregon statutes governing insanity are indefensible. That Oregon alone requires proof beyond a reasonable doubt of insanity places on the appellee herein a strong argument to pursuade by reason why such rule should not be unconstitutional. The Court will not tamper with state procedures so long as they afford due process, but this goes to the essence of process and appellee has failed to meet the challenge which we offered in the conclusion of our first brief. They support their argument only by the reluctance of the Court to interfere with state procedure. They do not support their argument by reason. They attempt to claim that the defendant is suffering from an emotional disturbance and would like to departmentalize the mind of the defendant and say that so long as he is sane in one department, even though he may be insane in another department, that he may be punished. There is no excuse for Oregon having this burden of proof. There is no excuse for Oregon to adhere [redacted] rule which contradicts the learning of medical sci[redacted] There is no question but this has deprived defendant of [redacted] process of law.

Bear in mind in considering this aspect of the case that the presumption created by Oregon law applies to persons who, if their claim is true, are by virtue of their disa-

bility unable to aid in their defense. In this case it is established that the defendant is subnormal and suffering from a mental disease. What chance has he to sustain the impossible burden placed upon him?

Reply to Appellee's Answer to Appellant's Assignment of Error No. Two

"ASSIGNMENT OF ERROR NO. TWO

"The Courts below erred in upholding the refusal of the trial Court to make available to defendant's counsel before trial a confession taken from defendant before he was advised of his right to be represented by counsel and before he was taken before a magistrate as provided by law, and that said error deprived defendant of his life and liberty without due process of law as guaranteed by the 14th Amendment to the United States Constitution."

We agree with counsel that under the enunciations of the cases cited by them with reference to the taking of confessions by force that the confession in this case should not be excluded on that ground other than by analogy. This confession was taken by fraud. The fraud was that it was represented to the defendant that the confession could be used for him or against him but when a request was made to examine the confession, that was denied.

It is no answer to this argument that in order to blunt the possibilities of error that counsel were offered the right to a short recess after the confession was offered in evidence. This was not a recess by which the case could be postponed for a day or so, during which time counsel could consult with the psychiatrist who was advising them and who was to testify, and it certainly did not in any way cure the error committed by denying counsel the right to have this confession in the preparation of the case, rather than in the middle of the case.

There is no answer to the fact that counsel were not given the confession in time to prepare his opening statement and to plan the course of the case in the manner of questioning. There is no answer to the fact that this confession was taken from a subnormal insane defendant and then denied to him and his counsel for the preparation of his case although the pretext upon which it was taken by the state's own admission was that the confession could be used for or against him. This court has, wisely or unwisely, limited the constitutional protections afforded to persons interrogated by the police under state charges. Appellant's counsel cannot agree with the refusal to give real protection against the often illegal methods of efficient metropolitan police forces. Certainly in the case at bar the procedure violated the spirit of the protecting statutes and constitutional procedure. We claimed that it violated due process even as now defined. How is a person suffering from the disabilities of the appellant, subnormal, uneducated and mentally sick, going to be defended if his appointed counsel are not permitted to prepare their case, are not allowed to see the confession taken by fraud and before he appears before magistrates? Either are they to obtain information to go forward? The statement of Mr. Ryan appearing in the Transcript; page 52, limns the problem with which counsel are confronted. They had no assistance from client as he was unable to give any. They were refused the record which he had been promised he could use.

The recitations by the appellee herein on the manner in which the defendant was defended, the fact that the defendant readily confessed, are all an evading of the question at issue. That question is simply this—was not defendant deprived of due process and effective counsel by refusal to grant the motion to examine this confession? Does this Court wish to extend a rule that they will not interfere

with state interrogation of witnesses to such a point where they can hold out to a defendant that he can use a confession and then deny him the use of the same when he has counsel who can and are able to protect his rights, particularly in a case where the defendant is of subnormal mentality and suffering from a mental disease?

Conclusion

In conclusion, Oregon is alone in requiring an impossible burden of proof of insanity. Oregon adheres to an unreal rule in insanity. Oregon seeks to punish this boy for a crime which he could not help.

Oregon refuses protection of its statutes to a person charged with such a crime and refuses the counsel appointed to defend him the right to examine the confession so as to prepare for the trial. Oregon makes mockery by its rule in State vs. Butchek, 121 Ore. 41, of the constitutional protection of a preliminary hearing and right against sure incrimination and to counsel.

Oregon would have the counsel of a subnormal, ignorant individual who is insane try their case with only what help such individual could give, and then be bound by the highest degree of proof possible in law. They would deny that individual his presumption of innocence.

This was a shocking crime. The very nature outraged many persons and made a fair trial impossible. The question here is whether the State of Oregon is a responsible party when they permitted this boy to leave the State Hospital although they knew he was suffering of a mental disease and whether the State of Oregon will not compound that wrong by punishing a person for a crime when he committed it because of an injury received in an accident in 1933. The essence of protection afforded in due process re-

volves around the idea that there can be no guilt without fault.

We respectfully ask a reversal of the Judgment below.

Respectfully submitted,

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